Total Future Sdn Bhd v Government of Malaysia & Ors

HIGH COURT (KUCHING) — SUIT NO S-KCH-21–7 OF 2010-I
RHODZARIAH BUJANG J
11 JUNE 2012

Arbitration — Arbitration clause — Existence of — Agreement containing arbitration clause — Whether arbitration rendered optional or mandatory

Contract — Construction of terms of contract — Arbitration clause — Whether terms of contract made arbitration a mandatory process for resolving disputes — Whether claim for reimbursement of difference in diesoline price came within ambit of arbitration clause

Contract — Construction of terms of contract — Breach — Claim for reimbursement of difference in diesoline price — Whether signing of final certificate of payment by plaintiff estopped plaintiff from making the claim

Contract — Construction of terms of contract — Intention of parties — Court bound by four corners of agreement — Court to give effect to plain meaning of words

On 7 May 2004 the plaintiff company was awarded a road construction project in Mukah. The employers of the contract were the Government of Malaysia and the Government of Sarawak ('the defendants'). The contract sum was agreed at RM22,746,428. That sum was fully paid and the last and final payment certificate was signed by the plaintiff's managing director ('PW1'). The plaintiff later commenced this suit for a sum of RM1,108,473.60 on the grounds that in the midst of the project, the price of diesoline increased and they incurred the said sum as extra costs due to the increase in the diesoline cost. The plaintiff therefore claimed for reimbursement of the said sum. The plaintiff contended that they were entitled to the difference in the price of the diesoline because the agreement executed by the parties catered for the contingent variation in the price of diesoline bought by the plaintiff in executing the contract. It was not disputed that the plaintiff was buying diesoline at the retail price fixed by the first defendant and was in fact paid the difference between that price and the basic unit price of 75.9 cents per litre. The problem however was that the first defendant had introduced two prices for diesoline effective January 2005 — actual/industrial price and retail price.

The retail price was for the general public, which was subsidized whilst the other price was for industrial users such as contractors. The subsidised retail price was lower but the plaintiff was only reimbursed the differential sum between the basic unit price of 75.9 cents and the retail price of diesoline — not the actual price they bought it. The issues to be determined by the court were, inter alia: (i) the mandatory procedures for dispute resolution, either by way of litigation or arbitration and if arbitration must be the first option; and (ii) the alleged estoppel created by the signing of the final certificate of payment.

Held, dismissing the claim:

(1) In construing the parties' intention, the court must be bound by the four corners of the agreement and must give effect to the plain meaning of the words (see para 8); *City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggunggan Bhd* [1985] 1 MLJ 285 referred; *Setapak Heights Development Sdn Bhd v Tekno Kota Sdn Bhd* [2006] 3 MLJ 131 referred.

(2) When cll 2.37.3 and 2.37.4 were read together with cl 43, their combined effect made it clear that arbitration was a mandatory process for resolving the dispute of the parties and the claim for reimbursement of the difference in the price of diesoline came within the ambit of the said cl 2.37.3 (i) and (ii) (see para 12).

(3) The pre-conditions stated in cl 2.37.3 on the requirement to give notices and the timelines to do so were also mandatory to the dispute resolution of the parties, whether arbitration or litigation was ultimately pursued (see para 13).

(4) The final payment certificate was signed by PW1 in which the plaintiff acknowledged and certified that they 'have no further claim under Contract No PWD/HO/B028/2004 beyond the net amount shown' in the said certificate. Having agreed to the conclusiveness and finality of the said certificate, the plaintiff must be made to abide by it for it was signed without any conditions attached. The defendants had a legitimate expectation when PW1 signed on the certificate that the plaintiff had accepted that final accounting between them had been done including the plaintiffs claims for the differential price which were made prior to its signing (see paras 15 & 19); *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 referred.

(5) The clear intention of the parties which could be gathered from cl 2.38 titled 'Variation In Price of Materials' was to reimburse the plaintiff for the difference between the basic unit prices as agreed with the retail prices of essential materials used in and purchased by the plaintiff for the project, to wit, cement, steel and diesoline. Therefore when the first defendant introduced two prices of diesoline which forced the plaintiff to purchase it at a higher price, it was unjust for the first defendant to

condemn the plaintiff to be paid with the difference in price set at the lower retail price. Thus, if the court had not decided the first two issues in the defendant's favour, the court would have allowed the plaintiff's claim (see paras 22 & 27).

[Bahasa Malaysia summary

Pada 7 Mei 2004, syarikat plaintif telah diberikan sebuah projek pembinaan jalan raya di Mukah. Majikan-majikan kontrak tersebut adalah Kerajaan Malaysia dan Kerajaan Negeri Sarawak ('defendan-defendan'). Jumlah kontrak telah dipersetujui pada RM22,746.428. Jumlah tersebut telah dibayar sepenuhnya dan sijil pembayaran akhir telah ditandatangani oleh pengarah urusan plaintif ('PW1'). Plaintif kemudiannya memulakan guaman ini bagi jumlah RM1,108,473.60 atas alasan bahawa dalam perjalanan projek tersebut, harga diesolin telah naik dan mereka telah menanggung jumlah tersebut sebagai kos tambahan akibat kenaikan kos diesolin. Plaintif oleh itu menuntut pembayaran balik jumlah tersebut. Plaintif menegaskan bahawa mereka berhak ke atas perbezaan harga diesolin kerana perjanjian yang dimeterai oleh pihak-pihak memperuntukkan bagi perubahan jangka harga diesolin yang dibeli oleh plaintif dalam memeterai kontrak tersebut. Tidak dipertikaikan bahawa plaintif membeli diesolin pada harga runcit yang ditetapkan oleh defendan pertama malahan telah membayar perbezaan antara harga tersebut dan harga unit asas sebanyak 75.9 sen seliter. Walau bagaimanapun masalahnya adalah bahawa defendan pertama telah menawarkan dua harga diesolin berkuat kuasa pada Januari 2005 — harga sebenar/industri dan harga runcit. Harga runcit adalah untuk orang awam, yang mana diberi subsidi manakala harga sebenar/industri adalah untuk pengguna industri seperti kontraktor. Harga runcit yang diberi subsidi adalah lebih rendah tetapi plaintif hanya dibayar balik dengan jumlah perbezaan antara harga asas unit sebanyak 75.9 sen dan harga runcit diesolin — bukannya harga sebenar yang telah mereka beli. Isu-isu yang perlu diputuskan oleh mahkamah adalah, antara lain: (i) prosedur mandatori bagi penyelesaian pertikaian, sama ada melalui litigasi atau timbang tara dan jika timbang tara sewajarnya menjadi pilihan pertama; dan (ii) estopel yang didakwa diwujudkan oleh pemeteraian sijil akhir pembayaran.

Diputuskan, menolak tuntutan:

(1) Dalam mentafsir tujuan pihak-pihak, mahkamah seharusnya terikat dengan empat penjuru perjanjian tersebut dan sewajarnya memberi kesan kepada maksud jelas perkataan-perkataan dalam perjanjian; *City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggunggan Bhd* [1985] 1 MLJ 285 dirujuk; *Setapak Heights Development Sdn Bhd v Tekno Kota Sdn Bhd* [2006] 3 MLJ 131 dirujuk (lihat perenggan 8).

(2) Apabila klausa 2.37.3 dan 2.37.4 dibaca bersama dengan klausa 43, kesan gabungan menyatakan dengan jelas bahawa timbang tara adalah proses mandatori bagi menyelesaikan pertikaian pihak-pihak dan

tuntutan bagi pembayaran balik perbezaan harga diesolin terangkum dalam klausa 2.37.3 (i) dan (ii) (lihat perenggan 12).

(3) Pra-syarat yang dinyatakan dalam klausa 2.37.3 mengenai keperluan untuk memberi notis dan tempoh masa untuk berbuat demikian adalah juga mandatori bagi penyelesaian pertikaian pihak-pihak, sama ada timbang tara atau litigasi akan akhirnya dijalankan (lihat perenggan 13).

(4) Sijil pembayaran akhir telah ditandatangani oleh PW1 yang mana plaintif mengakui dan mengesahkan bahawa mereka 'tidak mempunyai tuntutan tambahan di bawah Kontrak No PWD/HO/B028/2004 melebihi jumlah bersih yang ditunjukkan' dalam sijil tersebut. Setelah bersetuju dengan kesahihan dan kemuktamadan sijil tersebut, plaintif haruslah mematuhinya kerana sijil tersebut telah ditandatangani tanpa melampirkan sebarang syarat. Defendan-defendan mempunyai jangkaan sah apabila PW1 menandatangani sijil tersebut bahawa plaintif telah menerima bahawa akaun akhir antara mereka telah dibuat termasuk tuntutan-tuntutan plaintif bagi beza harga yang telah dibuat sebelum meteraiannya (lihat perenggan); *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 dirujuk (lihat perenggan 15 & 19).

(5) Tujuan jelas pihak-pihak yang dapat dilihat daripada klausa 2.38 yang bertajuk 'Perubahan Dalam Harga Material' adalah untuk membayar balik plaintif bagi perbezaan antara harga-harga unit asas seperti yang dipersetujui dengan harga runcit bahan-bahan penting yang digunakan dan dibeli oleh plaintif untuk projek tersebut, setakat, simen, keluli dan diesolin. Oleh itu apabila defendan pertama menawarkan dua harga diesolin yang memaksa plaintif untuk membelinya pada harga yang lebih tinggi, adalah tidak adil bagi defendan pertama untuk memaksa plaintif agar dibayar dengan perbezaan harga yang ditetapkan pada harga runcit yang lebih rendah. Dengan itu, sekiranya mahkamah tidak memutuskan dua isu pertama yang memihak kepada defendan, mahkamah akan membenarkan tuntutan plaintif (lihat perenggan 22 & 27).]

Notes

For a case on existence of arbitration clause, see 1(1) *Mallal's Digest* (4th Ed, 2012 Reissue) para 1572.

For cases on arbitration clause, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3674–3675.

For cases on intention of parties, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3715–3738.

Cases referred to

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (refd)

City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggunggan Bhd [1985] 1 MLJ 285; [1985] CLJ (Rep) 77, FC (refd)
Morello Sdn Bhd v Jacques (International) Sdn Bhd [1995] 1 MLJ 577, FC (refd)
Munusamy v PP [1987] 1 MLJ 492; [1987] 1 CLJ 250, SC (refd)
Pao On v Lau Yiu Long [1980] AC 614, PC (refd)
Paramill Sdn Bhd & Anor v Datuk Joseph Pairin Kitingan [2007] 7 MLJ 289; [2007] 6 CLJ 192, CA (refd)
Setapak Heights Development Sdn Bhd v Tekno Kota Sdn Bhd [2006] 3 MLJ 131; [2006] 2 CLJ 337, CA (refd)
Third World Development Ltd & Anor v Atang Latief & Anor [1990] 1 MLJ 385, CA (refd)

Legislation referred to

Contracts Act 1950 s 74
Evidence Act 1950 s 114(g)

Abang Halit bin Abang Malik (Loke, King, Goh & Partners) for the plaintiff.
Mohd Taufik bin Mohd @ Mohd Yusoff (Senior Federal Counsel (Civil), Attorney General's Chambers) for the first defendant.
McWillyn Jiok (State Legal Officer, Sarawak State Attorney-General's Chambers) for the second and third defendants.

Rhodzariah Bujang J:

[1] On 7 May 2004 the plaintiff company was awarded a road construction project in Mukah, the road being one which links Matu, Igan and Oya, all sub districts of Mukah in the seventh division of Sarawak. The employers of the contract were the Government of Malaysia ('the first defendant') and the Government of Sarawak ('the second defendant'). The agent of the employers for the execution of this contract was the director of Public Works Department and the contract sum was agreed at RM22,746,428. That sum was fully paid and the last and final payment certificate was signed by its managing director, one Othman bin Abdullah on 15 December 2008. Why this action is still filed by the plaintiff, not for some paltry sum but RM1,108,473.60 is to do with the price of diesoline. The plaintiff claimed that in the midst of the construction of the said road, the price of diesoline increased and they have incurred the additional sum as claimed when completing the works and for which they are now claiming for reimbursement. The plaintiff contends that they are entitled to the difference in the price of the diesoline because there are specific clauses in the agreement executed by the parties catering for the contingent variation in the price of diesoline bought by the plaintiff in executing the contract. These clauses are found in the special conditions of contract, one of four documents which the parties agreed shall be read and construed as part of the written agreement between them.

[2] Clause 2.38 on variation in price of materials provides as follows:

> (a) Adjustment of Contract Sum
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> Adjustment (upwards or downwards) shall be made to the Contract Sum should there by any variation in price of selected materials described hereunder:
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> (i) …
>
> (ii) …
>
> (iii) Automotive gas oil (Diesoline)
>
> (iv) …
>
> (b) Variation in Price of Materials
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> (i) Any adjustment will only be made where there is variation in price in respect of materials specified in paragraph (a) and against which Basic Unit Prices are given in the relevant Attachment to these Conditions. The Basic Unit Prices shall be as stated in the latest issue of Special Monthly Bulletins issued by the Statistics Department of Sarawak for Cement and Steel Bars for the month prior to that in which the tender closes.
>
> (ii) *Where a Contractor has in fact paid a higher or lower price for the materials as compared to the Basic Unit Prices specified in the relevant Attachment to these Conditions, the Contract Sum shall be accordingly increased or decreased provided such increase or decrease shall not exceed the difference between the Basic Unit Price stated in the Special Bulletins issued by the relevant Statistics, Department in the particular month in which the materials are delivered to site for use.* (Emphasis added.)

[3] The 'basic unit price' mentioned in sub-cl (b) above is in the schedule marked as Attachment 2B to the special condition of contract (see p 116 of exh P1) and in it is stated that for diesoline it is 75.9 cents per litre.

[4] It was not disputed at the trial that the plaintiff was buying diesoline at the retail price fixed by the first defendant and was in fact paid the difference between that price and the basic unit price of 75.9 cents per litre stated above. The problem only started when, again this is not disputed because it is in the evidence of the first defendant's own witness, Mr Ismail bin Yusof ('DW3') who was, at the time of the trial, a deputy chief statistician with the Department of Statistics Malaysia, that the first defendant introduced two prices for diesoline effective January 2005 — actual/industrial price and retail price. The retail price is for the general public, which is subsidised whilst the other price is for industrial users such as contractors. Of course the subsidised retail price is lower but the plaintiff, who from that effective date was forced to

buy diesoline at the actual price was only reimbursed the differential sum between the basic unit price of 75.9 cents and the retail price of diesoline — not the actual price they bought it.

[5] The first defendant's appointed consultant for the project, KTA (Sarawak) Sdn Bhd, gave evidence for the first defendant through their quantity surveyor, Mr Bong Siak Khiun. He had in fact prepared a tabulation (exh P3) of the difference in the basic unit price and the actual price of diesoline from January 2005 until the completion of the project which was not disputed to be November 2006 and the differential sum is the amount claimed by the plaintiff in this case.

[6] The defendants, represented by counsel, Mr Taufik bin Mohd Yusoff and Mr McWillyn Jiok respectively, have disputed the claim, stating in the main that the plaintiff has been paid in full the differential sum in the prices of diesoline and is therefore estopped from claiming the difference, having signed the final certificate for payment. They have also contended in their defences that the plaintiff's action is premature for failing to refer the dispute on the said price of diesoline for arbitration as provided in cll 2.37.2–2.37.3 of the special conditions of contract. The said clause reads:

> Precondition to Arbitration or Litigation 2.37.2
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> *Unless and until a party has complied with the following conditions, notices and submissions that party may not with respect to any dispute or difference commence proceedings whether by way of litigation or arbitration.*
>
> Notices and Submission 2.37.3
>
> If any dispute or difference shall arise between the Employer and/or the Engineer, and the Contractor, either during the progress or after completion of the Works, or after the determination of the Contractor's employment, or breach of this Contract, as to:
>
> (i) the construction of this Contract, or
>
> (ii) any matter or thing of whatsoever nature arising under this Contract, or
>
> (iii) …
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> then, subject nevertheless to Clause 2.33, such dispute or difference shall be decided as follows:
>
> (a) the Contractor shall, not later than fourteen (14) days after the dispute or difference arises, submit the matter at issue in writing, by hand or by AR Registered mail, specifying with detailed particulars the matter at issue (which in the case of claims covered by Clause 2.33 shall be limited to the particulars notified by the Contractor under that Clause), to the Engineer for decision, and the Engineer shall, as soon as practicable thereafter give his decision to the Contractor.

(b) If the Contractor is dissatisfied with the decision given by the Engineer pursuant to (a) above, he may, not later than fourteen (14) days after the decision of the Engineer is given to him, submit the matter at issue in writing by hand or by AR Registered Mail specifying with detailed particulars the matter at issue, to the Employer for decision and the Employer shall, as soon as practicable thereafter, give its decision to the Contractor in writing.

PROVIDED that the detailed particulars of the matter at issue shall be limited to those particulars which the Contractor under (a) above.

(c) If the Contractor is dissatisfied with the decision given by the Employer pursuant to (b) above, he may, not later than twenty-eight (28) days after the decision of the Employer is given to him, give notice in writing by hand or by AR Registered Mail to that effect.

The parties shall then, within a further 28 days seek to agree upon a process of resolving the whole or part of the dispute or difference by means other than litigation or arbitration, and furthermore shall attempt to agree upon:

(i) the procedure and timetable for any exchange of documentation and other information relating to the dispute or difference;

(ii) procedural rules and a timetable for the conduct of the selected mode of proceeding;

(iii) a procedure for the selection and compensation of a neutral person who may be employed by the parties for assisting in resolving the dispute; and

(iv) whether the parties should seek the assistance of a dispute resolution organisation.

[7] From the above simple narration of the background facts and pleadings, it is clear that my task is simply to interpret the relevant contractual provisions, in particular the special conditions of contract as regards the basic unit price of the diesoline, the alleged mandatory procedures for dispute resolution, either by way of litigation or arbitration and if arbitration must be the first option, as well as lastly, the alleged estoppel created by the signing of the final certificate of payment.

INTERPRETATION OF CONTRACTUAL PROVISIONS

[8] I do believe the case law on this is pretty much settled and in the written submissions of all the counsel before me, that position in law have been highlighted. I need only restate that in construing the parties' intention, I must be bound by the four corners of the agreement and must give effect to the plain meaning of the words (see for instance, the Federal Court case of *City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggunggan Bhd* [1985] 1 MLJ 285; [1985] CLJ (Rep) 77 and the Court of Appeal case of *City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggunggan Bhd* [1985] 1 MLJ 285;

[1985] CLJ (Rep) 77). I am nevertheless also minded to quote, as an emphasis on the point made above, what *Chitty on Contracts* (28th Ed), Vol 1 at para 12–043 states, and it reads:

> The cardinal presumption is that the parties have intended what they have in fact said, so that their words must be construed as they stand. That is to say the meaning of the document or of a particular part of it is to be sought in the document itself.

[9] Against the backdrop of the cases cited where the canons of interpretation of a contract have been laid out, my decision on the issues are as follows and I will start, for expediency, with the pre-conditions to dispute resolution and the arbitration issue.

MANDATORY ARBITRATION AND THE PRE CONDITIONS IN DISPUTE RESOLUTION

[10] When I examined the said cl 2.37, though the clause and its sub- clauses deal with the pre conditions to starting 'litigation or arbitration' arbitration is indeed a mandatory dispute resolution in the agreement between the parties of 'the construction of the contract or any matter or thing of whatsoever nature arising under this contract' as per cl 2.37.3(i)–(ii) because of the incorporation of cl 43 of the general conditions of contract, one of the four documents forming the agreement between the parties. This clause is specifically mentioned in cl 2.37.4 of the special conditions of contract and the relevant first part of that long clause is reproduced below. Clause 2.37.4 reads:

> Notice of Reference to Arbitration 2.37.4
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> After the expiration of the time established by or agreed under Clause 2.37.3 for agreement on a dispute resolution process, any party which has otherwise compiled with the provisions of this clause, may in writing delivered by hand or by AR Registered mail terminate the alternative dispute resolution process provided for and thereafter *give notice to the other party requiring the dispute or difference to be referred to arbitration, in accordance with clause 43.* (Emphasis added.)
>
> It shall furthermore be deemed to be agreed that the Arbitrator's jurisdiction in relation to the arbitration proceedings shall be limited to a determination of those matters which were identified in the original notice provided pursuant to Sub-Clause 2.37.3(a) and that in making his determination, the Arbitrator shall only be entitled to have regard to those particulars concerning the dispute provided pursuant to Sub-Clause 2.37.3(a) and it is further agreed that the party issuing the notice pursuant to Sub-Clause 2.37.3(a) shall be absolutely barred from raising or relying upon any particulars other than those provided in the notice issued pursuant to Sub-Clause 2.37.3(a).

[11] Clause 43 of the general conditions of contract reads as follows:

> 43. Provided always that in case any dispute or difference shall arise between the Employer or the Engineer on his behalf and the Contractor, either during the progress or after the completion or abandonment of the Works, as to the construction of this contract or as to any matter or thing of whatsoever nature arising thereunder or in connection therewith …, then either party shall forthwith give to the other notice in writing of such dispute or difference, *and such dispute or difference shall be and is hereby referred to the arbitration* and final decision of a person to be agreed upon between the parties in accordance with an subject to the provisions of the Arbitration Ordinance, and the award of such Arbitrator shall be final and binding on the parties. (Emphasis added.)

[12] Now when the said cll 2.37.3 (quoted earlier) and 2.37.4 are read together with cl 43, their combined effect makes it clear that arbitration is a mandatory process for resolving the dispute of the parties as stated above and it cannot be denied that this claim for reimbursement of the difference in the price of diesoline comes within the ambit of the said cl 2.37.3(i)–(ii).

[13] What is even clearer is that the pre-conditions stated in 2.37.3 on the requirement to give notices and the timelines to do so stated in the said clauses are also mandatory to the dispute resolution of the parties herein, whether arbitration or litigation is ultimately pursued. The plaintiff's managing director ('PW1') admitted in his evidence that no such notices were issued by the plaintiff. On this issue too, I was helpfully reminded by Mr Mohd Tauflk, in his written submission, of the Federal Court decision in *Morello Sdn Bhd v Jacques (International) Sdn Bhd* [1995] 1 MLJ 577 where Edgar Joseph Jr FCJ held that for the purposes of construction of contracts the intention of the parties is the meaning of the words they have used. Hence, said His Lordship, the question to be answered always is 'what is the meaning of what the parties have said', and not 'what did the parties mean to say'.

[14] When I posed that question in this case, it is obvious that the parties have intended for these pre conditions as a percursor to the resolution of their dispute whether it be by arbitration or litigation and I could only give effect to it as they have so agreed. I next consider the issue on estoppel.

ESTOPPEL BY CONDUCT

[15] Central to this issue is the final payment certificate signed by the plaintiff's managing director ('PW1') in which the plaintiff acknowledged and it is stated in the certificate that the plaintiff certified that they 'have no further claim under Contract No PWD/HO/B028/2004 beyond the net amount shown' in the said certificate which was RM1,097,440.88. It is crucial also to note and it is not disputed that out of the sum stated in the certificate, RM927,105.20 was for the differential sum in the price of diesoline of the basic

unit price and the retail price, though not its actual price. This certificate is actually issued and is governed by cl 35(g) of the general conditions of contract at p 134 of exh P1 and its conclusiveness and finality is couched in these terms:

> 35(g). The final certificate shall be conclusive evidence in any proceedings arising out of this contract (whether by arbitration under clause 43 hereof or otherwise) that the Works have been properly carried out and completed and properly and accurately measured and valued in accordance with the terms of this contract, save as regards any matter in respect of which notice in writing of a dispute or difference shall have been given in accordance with clause 43 hereof before the final certificate has been issued and save in so far it is proved in the said proceedings that any sum 10 mentioned in the said certificate is erroneous by reason of —
>
> (i) fraud, dishonesty or fraudulent concealment relating to the Works or any part thereof or to any matter dealt with in the said certificates; or
>
> (ii) any defect (including any omission) in the Works which reasonable inspection or examination at any reasonable time during the course of the execution of the Works or before the issue of the said certificate would not have disclosed; or
>
> (iii) any accidental inclusion or exclusion of any work material or figure in any computation or any mathematical error in any computation.

Obviously none of the three exceptions stated above applied to impugn the final certificate signed by the plaintiff.

COMMERCIAL PRESSURE

[16] PWI in his evidence said he was forced by circumstances to sign the certificate and he did it under pressure because if he did not sign it, the plaintiff would not have the funds to pay their sub contractors and suppliers as well as wages of their workers (see p 9, line 1 of the notes of proceedings). He pointed out that he had never abandoned his claims for the reimbursement of the difference in price of the diesoline either before or after the certificate was signed as shown by the correspondences addressed to KTA (Sarawak) Sdn Bhd and/or the defendants on this issue (see pp 1–7 of exh P2, the bundle of document agreed as to authenticity only). Mr Abang Halit, learned counsel for the plaintiff, cited the Singapore case of *Third World Development Ltd & Anor v Atang Latief & Anor* [1990] 1 MLJ 385 as authority for the proposition he made that this pressure on his client to sign the said certificate was a commercial pressure that amounts to a coercion which vitiated the plaintiff's consent, and hence the validity of the certification on it. He even went further and said that the 'condition' stated on the certificate, viz:

> We/I hereby certify that we/I have no further claim under contract No PWD/HO/BO28/2004 beyond the net amount shown on this statement (RM 1,097,440.88),

is 'mala fide as the defendants know from the beginning that the plaintiff still has a claim pending' in respect of the differential sum. That 'condition' also lacks consideration, said Mr Abang Halit and is therefore void.

[17] It is significant to note that in this case of *Third World Development*, the court actually rejected the defence of the appellant that they were coerced into signing an undertaking, holding that the commercial pressure on the appellant did not amount to economic duress. It is only when the commercial pressure became a coercion of the will of the appellant that it vitiated his consent, said the Singapore Court of Appeal. They cited the judgment Lord Scarman in *Pao On v Lau Yiu Long* [1980] AC 614 at pp 635–636 where His Lordship said as follows:

> Duress, whatever form it takes, is a coercion of the will so as to vitiate consent. Their Lordships agree with the observation of Kerr J in *Occidental Worldwide Investment Corporation v Skibs A/S Avanti* [1976] 1 Lloyd's Rep 293 at p 336 that *in a contractual situation commercial pressure is not enough. There must be present some factor 'which could in law be regarded as a coercion of his will so as to vitiate his consent'.* The conception is in line with what was said in this board's decision in *Barton v Armstrong* [1976] AC 104 at p 121 by Lord Wilberforce and Lord Simmon of Glaisdale — observations with which the majority judgment appears to be in agreement. In determining whether there was a coercion of will such that there was no true consent, it is material to inquire whether the person allegedly to have been coerced did or did not protest; whether, at the time he was alleged coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it. All these matters are, as was recognised in *Maskell v Horner* [1915] 3 KB 106, relevant in determining whether he acted voluntarily or not. … *The commercial pressure alleged to constitute such duress must, however, be such that the victim must have entered the contract against his will, must have had no alternative course open to him, and must have been confronted with coercive acts by the party exerting the pressure: Williston on Contracts* (3rd Ed), 1970 vol 13, s 1603. (Emphasis added.)

[18] From my reading of the said case, particularly the highlighted portion in the quotation above, it is apparent that before any commercial pressure can amount to economic duress, one of the pre-existing conditions is that the said pressure must be exerted by the other contracting party. It must not, as was admitted in the evidence in this case, be self induced or self imposed. It is extremely dangerous and would in fact create havoc and uncertainty in the business world if the court were to allow such self induced pressure to vitiate a contract or to allow it as justification for a contracting party to abrogate the position he has taken and intended in a written document after the ink on it has dried.

[19] In this case, having agreed to the conclusiveness and finality of the said

certificate, the plaintiff must be made to abide by it for it was signed, as admitted by PW1, without any conditions attached. It would be unjust to allow the plaintiff having induced the defendants to pay him the amount stated to be final in the certificate, to resile from that position now especially since they have made the claims for the reimbursement of the difference in the petrol price before the signing of that certificate and have been paid the differential sum, though based on the retail price. The defendants would have the legitimate expectation when PW1 signed on the certificate that the plaintiff has accepted that final accounting between them has been done including the plaintiff's claims for the differential price which were made prior to its signing. I would in this regard refer to the decision of the Federal Court in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283 for the proposition, as stated in the judgment of Gopal Sri Ram JCA (as His Lordship then was) that a court may permit a litigant to argue that his opponent is estopped from raising a particular contention if it is in the interest of justice to do so and it is the judge who must decide, after taking due regard of all the circumstances of the case, where the justice of the case lies. Given the relevant clauses in the contract as reproduced above and the unequivocal certification by PW1 of the final amount due to the plaintiff, I say that justice lies with giving due respect and deference to what the parties themselves have agreed in these clauses. This means the plaintiff must be bound by their own certification that there was no more outstanding amount due to them other than the sum stated in the final certificate.

THE CASE FOR REIMBURSEMENT

[20] Despite my decision on the two issues above, it is only fair that I still go on to consider the plaintiff's argument as to their entitlement to the differential sum and my considerations of this issue and the evidence in support of it below are made on the assumption that the earlier two issues were decided in their favour.

[21] I have in the early part of this judgment laid out the undisputed background facts and evidence giving rise to the plaintiff's claim for the differential sum between the basic unit price of diesoline as stated in the schedule to the special conditions of contract and the actual price of diesoline that they have purchased the diesoline with following the first defendant's move to introduce two types of prices of diesoline in the market.

[22] Now, the clear intention of the parties which I can gather from cl 2.38 titled 'Variation In Price of Materials' which I quoted at the start of this judgment is to reimburse the plaintiff for the difference between the basic unit prices as agreed with the retail prices of essential materials used in and purchased by the plaintiff for the project, to wit, cement, steel and diesoline.

Therefore when the first defendant introduced two prices of diesoline which forced the plaintiff to purchase it at a higher price, it is unjust for the first defendant to condemn the plaintiff to be paid with the difference in price set at the lower retail price. That surely is not in accord with the very intention, if the purchase price of the essential items were higher than the agreed basic unit price, to reimburse them for the differences in the prices of these essential items in the first place. The parties have of course wanted the reimbursements to be based on a fair standard which was why the differential sum must be benchmarked against the 'Basic Unit Price' stated in the special bulletins issued by the relevant Statistic Department …' as provided in sub-cl (b)(ii) of cl 2.38. (see p 11 of exh P1). And the evidence of the deputy chief statistician on this is very clear, there were in fact two prices for diesoline as mentioned earlier although in their publication, Special Release 1 for May 2005, only one price was shown (see pp 43–44 of exh P2). This was later rectified and shown in the Special Release 1 for January and June 2006 (see pp *65 and 32*, 51–52 of exh P2, respectively), where the two prices of diesoline are stated.

[23] I need to explain that the pages for the January Special Release 1 in exh P2 are so far apart because of the mistake in the compilation of the bundle of document as admitted by Mr Mohd Taufik at the end of trial (see p 45 of the notes of proceedings).

[24] Given that the plaintiff had actually paid for the diesoline at the actual price and not the subsidised retail price from January 2005–November 2006 when the project was completed, it stands to reason that they should be paid the differential sum as claimed, not the alternative amount of RM586,822.60 suggested by Mr Mohd Taufik in his written submission. That figure was given by him because he said the starting point of the calculation should be January 2006 and not January 2005 because the 'two prices were only published by the Department of Statistics Malaysia starting 2006 upon being requested by the JKR'. With respect, that argument is untenable because of the clear evidence by the deputy chief statistician that there were in fact two prices for diesel starting January 2005. The delayed publication of the same by the Department of Statistics Malaysia cannot, in my view, override what has been proved to be the actual fact on the ground and which was given official recognition by the said department in their subsequent Special Release 1 for January and June 2006 mentioned in the preceding paragraph of this judgment.

[25] As for the first defendant's argument canvassed in the submission of their counsel that the plaintiff has failed to prove the amount claimed because it being special damages, there must be invoices and receipts of the purchases of the diesoline at the actual price produced at the trial, it is unacceptable for two reasons. Firstly, the amount claim is not damages for breach of contract under s 74 of the Contracts Act 1950. It is a claim for an entitlement provided in the

contract itself and distinguishable from damages. Secondly, the proof of the quantification of the claim is with the defendant's own appointed consultant for the project who did the calculation and tabulation of the said differential sum (exh P3). That is the best and most cogent evidence on the claim because it came from a third party who had been entrusted by the defendants themselves with the task of overseeing the project. Whilst I am on the topic of best evidence, I must now address an evidential issue raised by the plaintiff against the second and third defendants.

ADVERSE INFERENCE

[26] It was pointed out in Mr Abang Halit's submission that by the second and third defendants' failure to call any witnesses of their own, it has compromised their defence in this case. I have to say that this argument is untenable because the defences raised by them in their statement of defence are the same with that of the first defendant's and the subject matter being a project undertaken by them for the first defendant, all the witnesses called by the first defendant, particularly that of the consultant and DW2, a Public Works Department of Sarawak's quantity surveyor (since retired) are the common witnesses for all of them. I wish to respectfully point out to the plaintiff that the quantity surveyor was a former employee of the second defendant who testified that he was working under the third defendant, the Director of Public Works Sarawak. Thus, no adverse inference can be drawn from the non-calling of any witnesses by the second and third defendants. Moreover, it is trite law that an adverse inference under s 114(g) of the Evidence Act 1950 can only be drawn from the withholding and suppression of evidence (see *Paramill Sdn Bhd & Anor v Datuk Joseph Pairin Kitingan* [2007] 7 MLJ 289; [2007] 6 CLJ 192, applying the principle enunciated in *Munusamy v Public Prosecutor* [1987] 1 MLJ 492; [1987] 1 CLJ 250). The fact that the consultant and the quantity surveyor of the second defendant have testified shows there was no such suppression or withholding of evidence in this case. As for the third defendant, he was merely the head of department for the second defendant and as the evidence unfolded at the trial, it shows that he has no useful contribution to be made to what have already been stated by the other two witnesses called by the first defendant. In other words, he was not a material witness for the trial.

[27] Thus, if I had not decided the first two issues in the defendant's favour, I would have allowed the plaintiff's claim as prayed by them with interest at 4%pa from the date of this judgment until full settlement. Unfortunately, the resolution of the first two issue have militate against them.

[28] As for costs of the trial, it is for the defendants but in this proportion: RM25,000 for the first defendant and RM5,000 for the second and third

defendants because as I have made clear above, the second and third defendants did not call any witnesses of their own and their counsel participated even less at the trial.

Claim dismissed.

Reported by Kanesh Sundrum